
The Contempt of Power and Legislative Tribunals

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Commentary

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Notes

THE CONTEMPT POWER AND LEGISLATIVE TRIBUNALS

One of the dangers of regulatory boards is that they may tend to usurp the powers of the legislative branch, but an even greater danger is their taking of powers which properly belong to the courts.

The editorial statement, above,¹ appeared recently in a prominent Canadian newspaper. It was part of a warning which, though hardly novel, is of such extreme importance in the maintenance of a democratic system, that it warrants constant repetition. During the last four decades, there has been a steady trend towards the dissemination of central governmental powers as a result of an immense growth in government activities and responsibilities. The main recipients of these powers have been legislatively created tribunals formed to administer the subject matter of the statute which constitutes them. The legal profession in Canada, Britain, and the United States,² has watched with increasing concern the gradual encroachment by these tribunals on judicial powers which have traditionally belonged solely to the courts. Such encroachment has been justified, allegedly, by the need for administrative expediency. However, there are obvious perils in placing such powers in the hands of officials who are not trained to be judges, and who preside in tribunals which are not bound by the time-tested procedure and rules of the courts.

One of the gravest of these perils is the obliteration of the distinction between the three basic branches of the government which are inherent in our Constitution. It has been said in England that Dicey's great principle, the Rule of Law, is the reflection of a balance between the executive, legislative, and judicial functions of government. While the distinction in constitutional branches should not be tortured into Montesquieu's doctrine of a rigid separation of powers, the identification of these three functions in one body tends to bureaucracy in substitution for the judicial process.³

¹ *Toronto Globe and Mail*, January 7, 1963, p. 6.

² In the United States, there has been an abundance of writing on the conflict between the constitutional separation of powers and judicial aspects of the authority of governmental agencies. For a helpful survey of the problem generally, and the use of the contempt power by these agencies, see Hart, *An Introduction to Administrative Law*, 205; *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 780; *Legislative Power to Punish for Contempt*, 3 Geo. W. L. Rev. 468; *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894).

³ For a vigorous defense of administrative tribunals see *The Functions of Tribunals in the Modern State* by Dr. Edith Summerskill, *British Journal for Administrative Law*, p. 93 in which the author emphasizes the great volume of work accomplished by these tribunals which could not be handled by the courts, the delay involved in making applications to the courts and the advantages of an informal procedure.

Of all the powers exercised by the courts, perhaps none is more susceptible to misuse than the summary jurisdiction to punish for contempt. The extraordinary nature of this power is best illustrated by the following extract:

In all cases of contempt tried "brevi manu", the Judge plays a three fold role. He is the party injured, he is the prosecutor, and he is the Judge. And what is more, his power to punish for this contempt was till lately unlimited. The contemner did not even possess the right of appeal; in short, his right there is none to dispute. Judges have a power which even the highest executive head of the state . . . does not possess.⁴

There is no doubt that such a power is essential to the maintenance of orderly proceedings and public respect which the courts must enjoy if they are to function efficiently. Is it necessary, however, to bestow the same unusual authority on administrative tribunals in order that they may carry out their duties properly? An answer to this question has been given recently by the Ontario Court of Appeal in *Re Diamond and the Ontario Municipal Board*.⁵ The Court held that the Municipal Board had the power of an inferior court of record to punish for contempt. For a better appreciation of the ramifications of this decision, it is appropriate that we examine the contempt power more closely.

The concept of contempt is very ancient and has been described as being "coeval with the first foundation and institution"⁶ of English courts. Sir John Fox introduces his book on contempt with the statement, "Rules for preserving discipline, essential to the administration of justice, came into existence with the law itself, and Contempt of Court (contemptus curiae) has been a recognized phrase in English law from the twelfth century to the present time."⁷ Because of its arbitrary nature, judges have asserted that the power exists not for their own personal vindication, but for the public good as an instrument to ensure the proper administration of justice. Lord Justice Bowen stated that the power has been given to judges to prevent any interference with the course of justice. "It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to Judges are not allowed."⁸ Chief Justice McRuer puts it even more strongly when he writes:

I say with emphasis that the law of contempt of court does not exist for the protection of judges but for the protection of the individual right of every citizen to an independent administration of justice free from influence or intimidation by improper conduct of any sort.⁹

An adequate definition of contempt, though frequently attempted by judges and writers, is difficult to formulate because the offence is capable of so many manifestations. The best one can do is to pos-

⁴ Chand and Sarin, *The Law of Contempt of Court and Legislature* (2nd. ed., 1949) 74.

⁵ [1962] O.R. 328.

⁶ *R. v. Almon*, (1765) Wilmot's Notes 243, 254.

⁷ Fox, *The History of Contempt of Court*, 1.

⁸ *In re Johnson* (1887), 20 Q.B.D. 68 at 74.

⁹ McRuer, *Criminal Contempt of Court Procedure* (1952), 30 Can. Bar Rev. 225 at 227.

tulate a general definition and try for more precision by classifying the numerous examples of contempt into broad categories. From the leading authorities, it would appear that the basic element of the offence is an act which tends to thwart the legal process either by bringing it into disrepute or by interfering with its administration.

These acts have been classified as civil and criminal. A criminal contempt is in the nature of a direct affront to the dignity and authority of the court. A civil contempt is a defiance of the procedure or order of a court in a civil action. Oswald states:

. . . contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; . . . contempt in disregarding orders or judgments of a Civil Court, or in not doing something ordered to be done in a cause, is not criminal in its nature.¹⁰

This distinction, although firmly rooted in the history of the law of contempt, is not as plain as the definition above suggests. For example, it is clear that criminal contempt may be committed in a civil action. In a case where an injunction order had been disobeyed, it was held by the Supreme Court of Canada that such disobedience amounted to criminal contempt punishable by the court on its own motion even though the plaintiff had withdrawn its motion for the committal of the defendant. In his judgment, Kellock, J. said:

There are many statements in the books that contempt proceedings for breach of an injunction are civil process, but it is obvious that conduct which is in violation of an injunction may, in addition to its civil aspect, possess all the features of criminal contempt of court. In the case of a breach of a purely civil nature, the requirements of the situation from the standpoint of the enforcement of the rights of the opposite party constitute the criterion upon which the Court acts. But a punitive sentence is called for where the act of violation has passed beyond the realm of the purely civil.¹¹

The discovery of the boundaries delineating that "realm of the purely civil" has given difficulty to the courts in Anglo-American jurisdictions, especially where such matters as the right of appeal, the applicability of certain rules of evidence and liability for payment of costs are involved.¹²

The merging of criminal with civil aspects of contempt is further seen in a second broad classification that distinguishes direct from constructive contempts. A direct contempt is one that is committed in the face of the court and it appears that this offence is criminal in nature whether it is committed in criminal or civil proceedings. Chief Justice McRuer divides criminal contempt into three classes, the first category being contempt committed in the face of the court. He states that these contempts include:

¹⁰ Oswald, *Contempt of Court*, (3rd. ed.), 36.

¹¹ *Poje v. Atty.-Gen. of B.C.*, [1953] 1 S.C.R. 516 at 517; 2 D.L.R. 785 at 787.

¹² For a fuller discussion of this problem, and that of classification in general, see Chand and Sarin, *supra*, footnote 4, c. 3.

Demonstration in the courtroom by shouting and noisy behaviour; applauding a verdict of a jury or decision of a judge; refusing to give evidence when properly subpoenaed as a witness or to answer relevant questions; refusing to leave the courtroom when ordered to do so or to obey the orders of the court or its officers with respect to a trial which is in progress, whether civil or criminal, or using abusive or disrespectful language to a judge presiding at the trials.¹³

Constructive contempts are those committed outside the presence of the court and may take the form of "scandalizing the court"¹⁴ by an act or publication of matters which bring the administration of justice into disrepute. This type of contempt may also be found in an act or publication which tends to prejudice the fair trial of an issue which is or will be before the courts.¹⁵

It is well established that all courts of record may punish direct contempt summarily by fine or imprisonment or both, while superior courts have the same power to punish both direct and constructive contempt. The existence of such power was strongly asserted in a celebrated but undelivered judgment of Justice Wilmot, written in 1765. He stated:

It is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the Common Law.¹⁶

Legal historians have cast doubt upon the "immemorial usage" of which Wilmot writes, but the judgment has been cited so often and its principles are so firmly imbedded in the law, that its accuracy has never seriously been questioned. Mr. Justice McGillivray has spoken of the power as "a right in the Courts which has become so well rooted in judicial practice that nothing other than legislative action can take it away."¹⁷

¹³ Oswald, *supra*, footnote 9, at 227. Further instances of this kind of contempt may be found in Oswald, c. 3. The commonest example of such contempt in civil actions appears now to be the disobedience of injunctions. There are also several cases of misconduct by a counsel. *In re Duncan*, [1958] S.C.R. 41, 11 D.L.R. (2nd) 616, a counsel was found to be in contempt of court for his suggestion that the interests of justice would be better served if a certain member of the bench absented himself.

¹⁴ The phrase appears to have been first used by Lord Hardwicke in *Read v. Huggonson* (1742) 2 Ath. 469 at 471. For an interesting modern case on "scandalizing" the court, see *R. v. The Vancouver Province, (re Nicol)*, 12 W.W.R. (N.S.) 349; 108 Can. C.C. 355; [1954] 3 D.L.R. 690, in which a well known Canadian humorist wrote an allegory on the subject of capital punishment.

¹⁵ *Per* Lord Russell in *The Queen v. Gray*, [1900] 2 Q.B. 36 at p. 40. "Any act done or writing published, calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court." In *Re Dorion* (1953), 17 C.R. 352, 10 W.W.R. (N.S.) 379, the court held that a newspaper should not publish a document not admitted in evidence during the trial. In *R. v. McDonald*, [1939] 4 D.L.R. 377, [1939] O.W.N. 548, contempt was found in the act of selling a fictional account of a murder accompanied by a picture of the accused shortly before the trial.

¹⁶ *Supra*, footnote 6 at p. 254.

¹⁷ *Re Campbell v. Cowper*, [1935] 1 D.L.R. 633, at 651.

In the light of this brief discussion of contempt, what is the extent of the power which has been given to the Ontario Municipal Board? *Re Diamond* was an application to the Court of Appeal in the form of a stated case pursuant to section 93 of the *Ontario Municipal Board Act*.¹⁸

The major question to be determined was whether the Municipal Board, by its enabling legislation, which gave it the rights and privileges of the Supreme Court with respect to the attendance and examination of witnesses,¹⁹ could compel witnesses to answer, and following a refusal to answer, commit a witness to jail. The respondents asserted that the Board was not in fact a court of record and did not have the capacity to receive powers that were essentially judicial. Alternatively, it was argued that since the contempt power held such potentiality for interference with individual liberty, that it should not be attributed to an administrative body in the absence of the most unambiguous language. Schroeder, J.A., after reviewing the sparse authorities, held that the Board had the power to punish for contempt committed in the face of the court. He states at page 331,

S. 33 The Board for all purposes of this Act has all the powers of a court of record and shall have an official seal which shall be judicially noted.

S. 37 The Board for the due exercise of its jurisdiction and powers . . . has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents . . . enforcement of its orders and all other matters necessary or proper therefor.

It is necessary in many cases for the Board, in discharging its functions, to ascertain the facts with which it has to deal, and in the conduct of its enquiries it is essential that it possess incidental powers commonly associated with a Court of Justice. If it were not invested with the power to punish a witness who refuses to be sworn . . . or refuses to answer a question when directed to do so, the administrative machinery of the Board would soon grind to a halt, for the most effective direct sanction commonly available to compel obedience to such an order or direction is the power to hold a recalcitrant witness in contempt and, as a means of coercion, to commit him to prison.

In studying the effects of this decision, it is important to realize that the language found in section 37²⁰ of the *Ontario Municipal Board Act* is not peculiar to this statute. Similar words which confer the powers of a court of record for matters such as the summoning and examination of witnesses may be found in the enabling legislation of many other boards and commissions.²¹

¹⁸ R.S.O. 1960, c. 274.

¹⁹ See *Ontario Municipal Board Act*, R.S.O. 1960, c. 274.

²⁰ *Ibid.*

²¹ See, for example, the powers of the Board of Transport Commissioners in the *Railway Act* R.S.C. 1952, c. 234, s. 33(3); of the Ontario Labour Relations Board in the *Labour Relations Act* R.S.O. 1960, c. 202, s. 77(2)(a); of the Ontario Workmen's Compensation Board in the *Workmen's Compensation Act* R.S.O. 1960, c. 437, s. 65. Similar powers are given to royal commissions constituted federally under the *Inquiries Act* R.S.C. 1952, c. 154, s. 4 and 5 and in Ontario under the *Public Inquiries Act* R.S.O. 1960, c. 323, s. 2.

It is paradoxical that this power, which judges have cautioned themselves to use only sparingly and under extreme circumstances,²² should be given so freely to officials who may have had no legal training whatsoever. It is undoubtedly true, as Mr. Justice Schroeder states above, that without an adequate sanction, the work of these tribunals may be severely hampered. However, is this particular power, notwithstanding its advantages of being a quick and effective remedy, the proper sanction?

In answering that question, it is necessary to consider two points. First, contempt committed in the face of the court, as we have seen, includes within its boundaries, much more than a mere refusal to answer a question or attend a hearing. Insolence directed at a judge, creating a disturbance in the court, attempts to influence the judge, interference with other witnesses or officials of the court and unseemly behaviour by a counsel are but a few examples of this kind of contempt.²³ Any of these acts might be committed during the performance of the general powers of examination which have been given to many boards and commissions.²⁴ According to the *Diamond* case, therefore, an official insulted by a witness during the course of examination could exercise the contempt power. Are such members of legislative tribunals competent to pass judgment on all types of direct contempt? Is this not a purely judicial power which should lie outside the scope of administrative authority?

Secondly, there is the question of appeal. The determination of the right to appeal has depended traditionally on whether the act of contempt was civil or criminal. In the case of criminal contempt, there was no right of appeal prior to the re-enactment of the Criminal Code in 1954.²⁵ On the other hand, a committal or fine for civil contempt, as a result of a motion by one of the parties in a civil action, could be appealed.

Section 9(1) of the Criminal Code states,

Where a court, judge, justice or magistrate summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal against the punishment imposed.

It will be noticed that the section gives the right of appeal from punishment by a "court, judge, justice or magistrate". There is no provision for an appeal from an administrative tribunal. Thus, if

²² Lord Morris in *McLeod v. St. Aubyn*, [1899] A.C. 549 at 561, states: "Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice." See also Chancellor Boyd in *Meriden Britannia Co. Ltd. v. Walters* (1915), 34 O.L.R. 518 at 520: "Sir George Jessel's judicial admonition was, that such arbitrary and unlimited jurisdiction should be jealously and carefully watched, and exercised with anxiety and reluctance: *In re Clements* (1877), 46 L.J. Ch. 375, 383."

²³ *Supra*, footnote 13.

²⁴ *Supra* footnote 21.

²⁵ S.C. 1953-54, 2-3 Eliz. II, c. 51. See, for example, *Poje v. Atty-Gen. of B.C.*, *supra* footnote 11, decided in 1953, in which it was held that no appeal lay from the order for committal in a case of criminal contempt.

contempts committed in the face of such a tribunal are criminal, (and it is submitted that, in spite of the difficulties of classification, they are,)²⁶ there is no right of appeal as the law now stands.

It is contended, therefore, that the direct contempt power, as it has been exercised by the courts, is not the proper sanction for the use of bodies other than courts. Obviously, however, these bodies need some measure of disciplinary authority. For the most part, such authority is necessary only to force persons to attend a hearing or inquiry and to answer the questions put to them. There could be no objection if administrative tribunals exercised a power to fine or imprison for these purposes alone.²⁷ For all other acts of contempt, application could be made by the tribunal to a superior court judge for a proper adjudication. This proposal requires that the *Diamond* case, which was a refusal to answer, be limited to its facts. The advantages of such restricted authority would be to allow a board or commission to exercise a sanction appropriate to its administrative duties without usurping powers which have always belonged exclusively to the courts. In addition, legislation should be passed to complement section 9 of the *Criminal Code* and ensure that punishment imposed by non-judicial bodies in the limited circumstances that have been suggested be subject to an appeal.

In England, a scheme has been advanced for the establishment of an administrative division of the High Court which would have general appellate and supervisory jurisdiction over all the administrative agencies. The idea was considered and rejected in a report to Parliament by the Lord Chancellor in 1957.²⁸ The primary objection was that such a plan would result in appeals from expert tribunals to an inexpert appellate body. The converse of that objection lends support to the proposals recommended here. Surely, it is inadvisable

²⁶ *Supra*, footnote 13, and especially the *Poje* case, *supra*, footnote 11, in which Kellock J. discusses the two types of contempt extensively. He adopts the view advanced by Lindley L.J. in *Seaward's Case*, [1897] 1 Ch. 545, which draws a distinction between contempt proceedings as mere process against a party for the purpose of compelling obedience to an order of the court in the interests of the party obtaining it and an act which the court feels is an obstruction of justice. In the latter case, the court can act on its own motion. This power is given to the Ontario Municipal Board by the *Diamond* case and, by implication, to all other legislative bodies which enjoy the same kind of enabling legislation. The confusion shown by the courts in classifying these types of contempt is demonstrated by the recent case of *Re Gagliardi* (1961), 27 D.L.R. (2d) 281. In dealing with an appeal from a contempt citation for knowingly assisting in the violation of an injunction order, the British Columbia Court of Appeal allowed both a criminal and civil appeal, and treated these as alternative arguments in the same proceedings.

²⁷ The *Canadian Bill of Rights* S.C. 1960, 8-9 Eliz. II, c. 44, provides protection for persons who are forced to answer the questions of any tribunal by stating in section 2, ". . . no law of Canada shall be construed or applied so as to,

(d) authorize a court, tribunal, commission, board or other authority to give evidence if he is denied counsel's protection against self incrimination or other constitutional safeguards."

²⁸ *Report of the Committee on Administrative Tribunals*, (The Franks Committee) Cmd. 218, at 29.

to take away powers from judges who are trained to exercise them properly and give them to inexperienced bodies.

There is no doubt that legislative tribunals render invaluable assistance in the performance of government activities. As well as their purely administrative duties, these bodies undertake an immense amount of work of a judicial nature that could not possibly be carried out by the courts. However, the mere fact that such work is being performed by tribunals other than courts does not justify their elevation to what is essentially the status of a court of law. As the report noted above states in its concluding words:²⁹

We regard both tribunals and administrative procedures as essential to our society. But we hope that we have equally indicated our view that the administration should not use these methods of adjudication as convenient alternatives to courts of law. We wish to emphasize that in deciding by whom adjudications involving the administration and the individual citizen should be carried out, preference should be given to the ordinary courts of law rather than to a tribunal unless there are demonstrably special reasons which makes a tribunal more appropriate . . .

This passage recognizes the importance of maintaining the courts as a separate and supreme judicial authority. Thus, it is only proper that a power which is as ancient as the courts themselves and, in its very arbitrariness, symbolic of the unique position of judges, should be kept to the greatest possible extent within the domain of the judiciary.